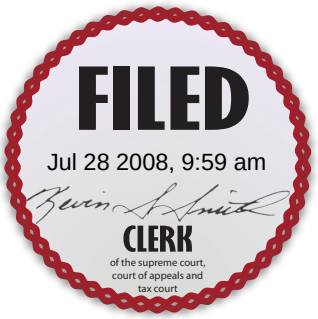

ATTORNEY FOR APPELLANT:

ROBERT N. REIMONDO
Capper Tulley & Reimondo
Crawfordsville, Indiana

IN THE COURT OF APPEALS OF INDIANA

TYLENE R. SHEPHERD,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A05-0712-CV-711
	)	
CLARENCE D. SHEPHERD,	)	
	)	
Appellee-Petitioner,	)	
	)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Richard A. Clem, Temporary Judge
Cause No. 49D04-0011-DR-1661

July 28, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

VAIDIK, Judge

Case Summary

Tylene R. Shepherd ("Mother") appeals the trial court's order modifying physical custody of the parties' sons, C.T.S. and M.A.S., to Clarence D. Shepherd ("Father"). Because the record shows that the children's academic progress has deteriorated and both children were being retained in their current grade levels, we conclude that the trial court did not abuse its discretion in concluding that there has been a substantial change in C.T.S.'s and M.A.S.'s adjustment to their school and that it is in the best interests of the children to modify physical custody to Father.

Facts and Procedural History

In November 2000, Mother filed a petition to dissolve the parties' marriage. At the time, the parties had two sons, C.T.S., born September 13, 1997, and M.A.S., born May 12, 1999. On January 16, 2002, the trial court granted the dissolution.[1] Mother was given sole custody of the children, and Father was given reasonable visitation.

In June 2006, Father filed a Verified Petition for Modification of Decree of Dissolution as to Child Custody and Support. A hearing was held, following which the parties agreed to joint legal custody with physical custody to remain with Mother until further notice. In addition, the trial court ordered an evaluation to be conducted by the Domestic Relations Counseling Bureau ("DRCB") of the Circuit and Superior Courts of Marion County.

[1] On January 31, 2002, approximately two weeks after the trial court granted the dissolution, Mother gave birth to a third child, H.S., who is a child born out-of-wedlock. Because of this, the trial court found that it did not have subject matter jurisdiction to address the paternity of H.S.

On November 30, 2006, Father requested a hearing on the issue of custody. A hearing was held in June 2007, and the matter was taken under advisement. The trial court, however, left the parties with the following remarks:

> I'll just give you a couple of comments. I'm very, very, very concerned about both the children, but I'm really concerned about [M.A.S.]. I mean, I know that you heard me say it five or six times, but a nine year old in the first grade is just . . . I mean, I'm so fearful that . . . I mean, other first graders aren't going to make fun of him because he's probably bigger than they are and he's certainly older than they are. But there sure may be fourth graders or fifth graders at the school who are basically not a whole lot older than he is and they're three grades ahead of him. I don't know and you didn't indicate, Miss Shepherd, whether you do have either one of the boys in counseling. I will tell you right now I think absolutely [C.T.S.] needs to be in counseling. I'm not a big proponent of it, but . . . I mean, he's having some behavioral issues. He was . . . he's apparently diagnosed with something that caused him to be given Stratera. He wouldn't take the Stratera apparently. And so I'm going . . . what your testimony is, is the doctor just said, well, I guess we won't do it. We won't give it to him. Boy, if a doctor ever said that, I think I'd go talk to another doctor because that's just . . . that's just totally wrong. I mean, if a child needs medication or if an adult needs medication, no matter who needs the medication, if they need help and just for whatever reason they're resistant to it, you can't just walk away and say, well, he won't take it. I will tell you, Mr. Shepherd, there's no question in my mind that both of your boys probably, but definitely [C.T.S.] says he wants to live with you. I can't take that into account. I mean, I have no reason to disbelieve that that's not the case. . . . I saw some brief references in the Domestic Relations report . . . . Our statute says though that the Court can give greater emphasis to children fourteen or over. So we can take into account what children want. But at the age of your children, no. And again, this may be another thing that relates to what I just said that [C.T.S.] may think that, hey, if I mess up in school and if I don't do what mom tells me to do and if I do this and if I do that, well heck, you know, the Judge is going to give me custody. Number one, that will not happen based upon that. But if that is one of the factors that he's thinking about, that's all the more reason he needs counseling. . . . And there's no question. No question both of you love your children. I mean, I don't, you know, there's not even the slightest possibility that I'm going to walk out of here saying, well, you know, it's pretty clear that one parent loves their children and the other parent just tolerates their kids. That's just not the case in this situation. My job is to determine if there's been a change of circumstances. And there's been evidence that would

> seem to support there has been to some degree. And number two, what's in the best interest of the children. That's not what's in mom's best interest. Not what's in dad's best interest. . . . It's just what is in the best interest of these children for these children to be able to grow up in an environment that will allow them to become productive members of our society. And it's not an easy case. I mean, I will tell you that right now.

Tr. p. 68-70.

On September 24, 2007, the trial court issued an order modifying physical custody of C.T.S. and M.A.S. from Mother to Father. That order provides, in relevant part:

> 2. The Decree is modified to provide that the parties shall have joint legal custody.
>
> 3. The Decree is modified to provide that Father should have primary physical custody of the children, [C.T.S.] and [M.A.S.]. *Although no request for findings were made, the Court finds that it is of great concern that [M.A.S.] will be nine (9) years old and is still in the first grade and that [C.T.S.] was retained in the third grade.*
>
> 4. Both parties are to submit to a urine drug test within forty-eight (48) hours of receipt of this Order, with the results to be immediately submitted to the Court.
>
> 5. The parties are referred to the Marion County Court Project . . . for assistance in finding and participating in some type of approved co-parenting program.
>
> * * * * *
>
> 8. The Court finds that neither parties nor any third party shall smoke with the children present in a confined space, such as the same room, vehicle, et cetera.
>
> * * * * *
>
> 10. The Court, in making this entry, has found that it is in the best interests of the children and there has been a change of circumstances so substantial and continuing as to make the prior custodial order unreasonable.

Appellant's App. p. 11-13 (emphasis added). Mother now appeals.

Discussion and Decision

At the outset, we note that Father did not submit an appellee's brief. In such a situation, we do not undertake the burden of developing arguments for the appellee.

Applying a less stringent standard of review with respect to showings of reversible error, we may reverse the lower court if the appellant can establish prima facie error. *State Farm Ins. v. Freeman*, 847 N.E.2d 1047, 1048 (Ind. Ct. App. 2006). Prima facie is defined in this context as "at first sight, on first appearance, or on the face of it." *Id.* The purpose of this rule is not to benefit the appellant. Rather, it is intended to relieve this Court of the burden of controverting the arguments advanced for reversal where that burden rests with the appellee. *Id.* Where an appellant is unable to establish prima facie error, we will affirm. *Id.*

Mother contends that the trial court erred in modifying physical custody of C.T.S. and M.A.S. to Father. We review custody modifications for an abuse of discretion, "with a 'preference for granting latitude and deference to our trial judges in family law matters.'" *Green v. Green*, 843 N.E.2d 23, 26 (Ind. Ct. App. 2006) (quoting *Apter v. Ross*, 781 N.E.2d 744, 757 (Ind. Ct. App. 2003), *trans. denied*). When reviewing a trial court's decision modifying custody, we may not reweigh the evidence or judge the credibility of the witnesses. *Id.* (citing *Leisure v. Wheeler*, 828 N.E.2d 409, 414 (Ind. Ct. App. 2005)). Instead, we consider only the evidence most favorable to the judgment and any reasonable inferences therefrom. *Id.* The burden of demonstrating that an existing child custody arrangement should be modified rests with the party seeking the modification. *Id.* at 27.

Indiana Code § 31-17-2-21 governs the modification of child custody orders and provides, in relevant part:

> The court may not modify a child custody order unless . . . the modification is in the best interests of the child; and . . . there is a substantial change in

> one (1) or more of the factors that the court may consider under section 8 of this chapter. . . . In making its determination, the court shall consider the factors listed under section 8 of this chapter.

These factors include:

> (1) The age and sex of the child.
>
> (2) The wishes of the child's parent or parents.
>
> (3) The wishes of the child, with more consideration given to the child's wishes if the child is at least fourteen (14) years of age.
>
> (4) The interaction and interrelationship of the child with:
>
> (A) the child's parent or parents;
>
> (B) the child's sibling; and
>
> (C) any other person who may significantly affect the child's best interests.
>
> (5) The child's adjustment to the child's:
>
> (A) home;
>
> (B) school; and
>
> (C) community.
>
> (6) The mental and physical health of all individuals involved.
>
> (7) Evidence of a pattern of domestic or family violence by either parent.
>
> (8) Evidence that the child has been cared for by a de facto custodian, and if the evidence is sufficient, the court shall consider the factors described in section 8.5(b) of this chapter.

Ind. Code § 31-17-2-8.

According to the trial court's order, the only factor the trial court took into consideration when modifying custody was the children's adjustment to their school. As

even Mother conceded, C.T.S. and M.A.S. were "really doing poorly in school." Tr. p. 16. At the time of the hearing in this case, M.A.S. was going to be nine years old and was being retained in the first grade. He had been in speech therapy since he was four years old and was in a special reading program. According to M.A.S.'s report card for the 2006-07 school year, he had six "U's" in behavior and failing grades in both reading and English. Also at the time of the hearing, C.T.S. was being retained in the third grade. According to C.T.S.'s report card for the same school year, he had failing grades in reading and was not able to meet state standards. C.T.S. was also in a special reading program. C.T.S. had difficulty both completing and turning in his homework. C.T.S. was diagnosed with Attention Deficit Disorder but did not take any medication because he refused to take it. In addition, the boys had bounced back and forth between school systems in Indianapolis and Lebanon.

Father, who lives in Sheridan, testified at the hearing in this case that he filed the petition to modify custody after he had the boys for "three months straight" because Mother "had a lot of stuff she needed to take care of." *Id.* at 48. Father testified that when he had C.T.S. and M.A.S. during this extended period, they completed their homework and "did excellent in school." *Id.* at 49. Father explained that he had visited the boys' schools, talked to their teachers and principals,[2] and seen their report cards. Father said that he would "see to it that [his] children get better educations" because he knows they can do "a whole lot better," meaning, move on to their respective grade levels. *Id.* at 47.

[2] Mother points out that the DRCB report indicates that Father did not know the names of the boys' teachers. However, the trial court was free to believe Father.

On appeal, Mother argues there is a "dearth" of evidence to support a change of custody. Appellant's Br. p. 7. She relies mainly on the DRCB report, which was completed on October 31, 2006, and submitted as an exhibit at the hearing. The DRCB report concluded that the parties should have joint legal custody of the boys with *Mother* having physical custody. Mother points to other portions of the fifteen-page report, including one portion where the report finds Father's statements that he had the boys for that three-month period to be "contradictory." Appellant's App. p. 56. However, the trial court was free to disbelieve this, as Father testified at the hearing that he kept the boys for an extended period of time. As highlighted by Mother in her brief, the report, indeed, has other negative things to say about Father, including that he acts "immaturely" toward Mother and "likely coached" the boys for their interview. *Id.* at 57. However, the report has many positive and negative things to say about both parents. In regard to the children's education, which is the only factor the trial court relied upon to modify custody, the report indicates that C.T.S.'s grades have deteriorated over the years, that he is having problems with homework, and that M.A.S. was retained in kindergarten. The report also mentions that both boys have had several tardies and absences over the years.

In sum, the record shows that although Mother has tried to improve C.T.S.'s and M.A.S.'s education, she has fallen short. The boys have bounced back and forth between school systems, C.T.S.'s grades have deteriorated and he is not meeting state standards, M.A.S. has failing grades, and, at the time of the hearing in this case, C.T.S. was being retained for the first time in the third grade and M.A.S. was going to be nine years old and in the first grade. Viewing the evidence in light of our deferential standard of review,

we conclude that the trial court did not abuse its discretion in concluding that there has been a substantial change in C.T.S.'s and M.A.S.'s adjustment to their school and that it is in the best interests of the children to modify physical custody to Father.

Affirmed.

MAY, J., and MATHIAS, J., concur.